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QI QIAOXIAN & ANOR v. SUNWAY PUTRA HOTEL SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[CIVIL APPEAL NO: WA-12BNCVC-104-12-2021]
19 SEPTEMBER 2022

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Abstract *– Section 7(8) of the Civil Law Act 1956 only allows a dependent to bring an action in their capacity as dependents if the 'circumstances' provided in the said section are satisfied. These 'circumstances' are conditions that, if proved, would confer legal standing in the claimants to bring a claim under s. 7 of the Act.*

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CIVIL LAW ACT: *Dependency claim – Loss of support – Deceased checked into hotel as guest and drowned at swimming pool – Claimants, claiming to be parents of deceased, commenced dependency claim – Whether proven that claimants' parents of deceased – Whether locus standi established – Civil Law Act 1956, s. 7*

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TORT: *Negligence – Damages – Claim for – Deceased checked into hotel as guest and drowned at swimming pool – Claimants, claiming to be parents of deceased, commenced claim for damages – Whether locus standi established – Whether hotel discharged duty of care to deceased – Whether hotel liable*

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One Qi XiangQing ('deceased'), a 22-year-old from China, had checked into the respondent's ('defendant') hotel as a guest. The deceased then proceeded to use the hotel's swimming pool. The deceased was later found dead, having drowned in the said pool. The appellants ('plaintiffs'), claiming to be the parents of the deceased, commenced an action against the respondent at the Sessions Court and claimed for loss of support and special and exemplary damages. Objecting to the plaintiffs' claim, the defendant contended that it had no knowledge of the plaintiffs being the parents of the deceased. The defendant further submitted that (i) it had provided a swimming pool which was suitable for swimming without any unusual dangers; (ii) there were signs of depth markers warning of the depth of the swimming pool at various points. There were also notices, warning that no lifeguard was provided, put up at the entrance and beside the swimming pool and at the male and female washrooms. Furthermore, there was no law or regulation providing for a lifeguard; and (iii) the defence of *volenti non fit injuria* was applicable to the facts and circumstances of the case. The Sessions Court dismissed the dependency claim brought by the plaintiffs on the grounds that: (i) the plaintiffs had no *locus standi* to bring a dependency action in their personal capacity as s. 7(2), read together with s. 7(8) of the Civil Law Act 1956 ('CLA'), were not satisfied; (ii) the plaintiffs failed to satisfy the evidential burden that established that the plaintiffs were the parents of the deceased

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and, therefore, the requirement to bring a dependency claim was not satisfied. In this regard, the plaintiffs failed to fulfil the conditions of s. 78(1)(f) of the Evidence Act 1950 ('EA') for the admission into evidence documents that would have established the relationship between the plaintiffs and the deceased; (iii) the plaintiffs failed to prove, on the balance of probabilities, negligence on the part of the defendant; and (iv) the defence of *volenti non fit injuria* was applicable on the facts and circumstances of the case. Hence, the present appeal.

Held (dismissing appeal with costs):

(1) Section 7(8) of the CLA allows a dependent to bring an action in their capacity as dependents if the 'circumstances' provided in the said section are satisfied. In the present case, the circumstances provided in s. 7(8) of the CLA, namely (i) there is no executor of the deceased's estate; or (ii) there is an executor but no action is brought by the executor within six months after the death of the deceased, have not been proven. There was not an iota of evidence produced by the plaintiffs to prove either of the above circumstances existed. It was not the plaintiffs' case that the deceased did not have an executor or, if there was an executor, the executor did not commence the action. Thus, even if the plaintiffs were parents of the deceased, they could not maintain a dependency action because sub-s. 7(8) was inapplicable for the above reason. On this ground alone, the appeal ought to be dismissed. (paras 16 & 17)

(2) At the Sessions Court, the plaintiffs tried to admit a notary certificate concerning the relationship of the plaintiffs with the deceased and an inheritance certificate, which were documents of a foreign country, as exhibits, but were unsuccessful. Pursuant to s. 78(1)(f) of the EA, the party intending to produce a document of a foreign country must either: (i) produce the original public document and give proof of the character of the document according to the law of the said foreign country; or (ii) a copy of the original document that is certified by the lawful keeper of the said document with a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy is duly certified by the officer having the lawful custody of the original and give proof of the character of the document according to the law of the said foreign country. The plaintiffs failed to meet the criteria provided for the admission of the said documents. (paras 20-22)

(3) Sufficient signs and warnings had been put up at vantage places as a warning to pool users. The main and most crucial was that there was a signboard stating 'no lifeguard on duty' put up at the entrance of the swimming pool. This signboard warned users, especially an adult, of the danger of entering the pool. The warning was followed with the words

A that the pool was used at their own risk. Secondly, there were clear signs informing users as to the various depths of the pool by depth markers painted at the side of the pool. In addition to that, safety float lines dividing the swimming pool according to the various depths were also laid in the swimming pool. The defendant had discharged its duty of care
B to the deceased. (para 42)

(4) There was no reason to disturb the findings and the decision of the Sessions Court on liability. This included the finding of *volenti non fit injuria* as a separate ground for dismissing the claim. (para 47)

C **Case(s) referred to:**
Darby v. National Trust [2001] All ER (D) 216 ***(refd)***
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Indermaur v. Dames [1866] LR ICP 274 ***(refd)***
Kerajaan Malaysia v. Yong Siew Choon [2005] 4 CLJ 537 FC ***(refd)***
Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals
D *[2018] 1 CLJ 585 FC* ***(refd)***
Lee Lau & Sons Realty Sdn Bhd v. Tan Yah & Ors [1983] 1 CLJ 231; [1983] CLJ (Rep) 222 FC ***(refd)***
Lembaga Kemajuan Tanah Persekutuan v. Mariam Mangu & Ors [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197 FC ***(refd)***
Liu Li v. Stampark Place Sdn Bhd [2017] 5 LNS 18 SC ***(dist)***
E *London Graving Dock Co Ltd v. Horton [1951] AC 737* ***(refd)***
McGraddie v. McGraddie And Anor [2013] 1 WLR 2477 ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
Nguyen Doan Nhan v. PP & Another Appeal [2018] 1 LNS 1583 CA ***(refd)***
Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan [1982] CLJ 151;
F *[1982] CLJ (Rep) 299 FC* ***(refd)***
Soo Boon Siong v. Saw Fatt Seong & Ors [2008] 1 CLJ 365 CA ***(refd)***
Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit Swee & Ors [2002] 4 CLJ 776 CA ***(refd)***
Thomas v. Thomas [1947] AC 484 ***(refd)***

Legislation referred to:
G Civil Law Act 1956, ss. 2, 7(2), (8), (3)(ii), (3B)
Evidence Act 1950, ss. 57(1), (2), (3), 73A(1), 78(1)(f)
Rules of Court 2012, O. 18 rr. 7(1), 13

For the appellant - Loh Chang Woo; M/s C W Loh & Assocs
For the respondent - Gan Khong Aik; M/s Gan Partnership

H *[Editor's note: Appeal from Sessions Court; Civil Suit No: WA-B52-14-02-2020.]*

Reported by Najib Tamby

I

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] This is an appeal against the decision of the learned Sessions Court Judge at Kuala Lumpur who dismissed the appellants' claim for loss of support under s. 7 of the Civil Law Act 1956 after a full trial. The appellants claim to be the parents of one Qi XiangQing ("the deceased") who had tragically drowned in the swimming pool of the respondent's hotel. The deceased was a guest at the hotel and hailed from China.

[2] For convenience, the parties in this judgment will be referred to as they were in the court below and all sections hereinafter mentioned refer to the Civil Law Act 1956 while where rules are referred to they refer to the Rules of Court 2012.

[3] On 14 June 2022, I dismissed the appeal. This judgment contains the reasons for my decision.

Background

[4] The following evidence is not in dispute. On 7 February 2017, the deceased came to Malaysia. On 14 February 2017, he checked into the defendant's hotel as a paying guest. He was 22 years old and a good swimmer. After checking in, he proceeded to use the swimming pool facility at the hotel and was subsequently found drowned in the said pool. Thirty minutes had lapsed when the deceased was having difficulties to the time he was discovered. A fact determined from the close-circuit television. The swimming pool at its deepest part had a depth of three meters. The *post-mortem* report revealed that the cause of death was due to drowning.

The Statement Of Claim

[5] The plaintiffs in para. 8 of the statement of claim expressly pleaded as follows:

> Kemalangan tersebut diakibatkan keseluruhannya dan/atau sebahagian besarnya oleh kecuaian defendan yang merupakan pemilik hotel tersebut.

[6] The particulars that were pleaded in the statement of claim were clearly stated as "Butir-Butir Kecuaian Defendan" which are particulars of negligence and which particulars were worded as follows:

> (a) Gagal untuk memberi sebarang amaran dan/atau meletakkan papan tanda amaran/peringatan dan papan tanda aras kedalaman yang sesuai di lokasi yang mudah dilihat (failed to put up any warning and/or signs as to the depth of the swimming pool at vantage locations which can easily be seen);

A (b) Gagal untuk menyediakan dan/atau meletakkan papan tanda bantuan pernafasan (CPR) di lokasi yang strategik dan jelas di kawasan kolam renang (failed to provide and/or put up cardiopulmonary resuscitation (CPR) signs at a strategic location of the swimming pool);

B (c) Gagal untuk menyediakan penyelamat bertauliah untuk mengawal dan menjaga keselamatan di kolam renang tersebut pada waktu operasi kolam renang (failed to provide an accredited life-guard for the safety of the persons using the swimming pool during operating hours);

C (d) Gagal untuk menempatkan penyelamat bertauliah di lokasi strategik (failed to provide an accredited life-guard at a strategic location of the swimming pool);

(e) Gagal untuk memastikan, mengawal, dan menjaga keselamatan pengguna kolam renang tersebut terutama kepada si mati (failed to ensure the safety of the persons using the swimming pool facility, D especially, the safety of the deceased);

(f) Gagal untuk mengambil langkah berjaga-jaga atau tindakan dalam apa cara sekalipun untuk mengelakkan kemalangan tersebut walaupun mengetahui bahawa kedalaman kolam renang tersebut iaitu sedalam tiga meter semasa kejadian adalah bukan kedalaman E kolam renang biasa untuk hotel (failed to take precautionary measurers to avoid persons drowning knowing that the depth of 3 meters is not the normal depth of a swimming pool for a hotel);

(g) Gagal memberi pertolongan cemas dan/atau bantuan tindak balas kepada peristiwa dan/atau kejadian yang meragut nyawa si mati F (failed to render first aid and/or assistance in respect of the incident and/or event that took the life of the deceased);

(h) Gagal menyediakan peralatan bantuan kecemasan dan menyelamat yang lengkap di lokasi yang mudah dilihat di sekeliling kolam (failed to provide first aid complete rescue and emergency equipment at vantage locations of the swimming pool);

G (i) Mendedahkan dan mewujudkan keadaan yang merbahaya luar biasa dan meletakkan si mati dalam satu situasi kecemasan dan tidak memberi peluang dan/atau amaran kepada si mati untuk mengelakkan kemalangan tersebut (exposing and creating an unusual danger and putting the deceased in an emergency situation H without giving any chance or warning to the deceased to avoid the accident).

[7] As a result of the abovementioned breaches of duty, the plaintiffs, as the parents of the deceased, claimed for loss of support, special damages and exemplary damages. The plaintiffs, in para. 11 of the statement of claim, I adopted the particulars of negligence to support the claim for exemplary damages.

The Defence

[8] The defendant pleaded that it had no knowledge of the plaintiffs being the parents of the deceased. It denied negligence and the particulars pleaded therein. The defendant pleaded that it had provided a swimming pool which is suitable for swimming without any unusual dangers. It pleaded that notices were put up warning that no lifeguard was provided and which notices were put up at the entrance to the swimming pool, beside the swimming pool and at the male and female washrooms. It was pleaded that signs were painted at the poolside as depth markers warning of the depth of the swimming pool at various points. It was also pleaded that there was no law or regulation providing for a lifeguard and that the defence of *volenti non fit injuria* was applicable on the facts and circumstances of the case. It was pleaded that first aid was given when the deceased was discovered motionless in the swimming pool.

The Decision Of The Sessions Court

[9] The learned Sessions Court Judge dismissed the dependency claim brought by the plaintiffs. The reasons given can be summarised as follows:

(i) Sub-sections 7(2) read with 7(8) were not satisfied and therefore the plaintiffs had no *locus standi* to bring a dependency action in their personal capacity.

(ii) The plaintiffs had failed to satisfy the evidential burden that establishes that the plaintiffs are the parents of the deceased and therefore the requirement to bring a dependency claim is not satisfied. In this regard, the plaintiffs had failed to fulfil the conditions of s. 78(1)(f) of the Evidence Act 1950 for the admission into evidence documents that would have established the relationship between the plaintiffs and the deceased.

(iii) As an alternative reason to failing to prove *locus standi* to bring an action under s. 7, the plaintiffs have failed to prove on the balance of probabilities negligence on part of the defendant.

(iv) The defence of *volenti non fit injuria* was applicable on the facts and circumstances of the case.

The Law On Appellate Intervention

[10] In considering this appeal, I kept in mind the following principles reiterated by the Federal Court in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67 (following the established principles stated by Lord Reed in *McGraddie v. McGraddie And Anor* [2013] 1 WLR 2477):

> [33] It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong. ...

A and in para. [49] adopted the following statements of Lord Reed as to what the 'plainly wrong' criterion entailed:

> 62. ... The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter,
B with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
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> ...
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C 67. It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact
D made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.

[11] The Federal Court then stated the time when the 'plainly wrong' test becomes applicable:

E [54] ... the 'plainly wrong' test only comes into play in the absence of the following: (a) material error of law; (b) critical factual finding which had no basis in evidence; (c) demonstrable misunderstanding of relevant evidence; and (d) demonstrable failure to consider relevant evidence. In the presence of any of the above, the appellate court is entitled to set aside the judgment of the trial court without having to consider the
F 'plainly wrong' test.

and in the same paragraph said that the four listed identified errors are not exhaustive and the following errors are to be added to the list which appear in *Thomas v. Thomas* [1947] AC 484, namely:

G (a) there is misdirection by the judge; (b) there is no evidence to support a particular conclusion; (c) there is material inconsistencies or inaccuracies; and (d) the trial judge fails to appreciate the weight and bearing of circumstances admitted or proved.

Deliberations And Decision

H **[12]** The main issues in this appeal are:

(i) whether the plaintiffs have *locus standi* to bring a dependency claim, to wit, that they are the parents of the deceased as required by sub-s. 7(2); and

I (ii) whether the plaintiffs have proven negligence and/or breach of occupier's liability on a balance of probabilities.

[13] I found that the learned Sessions Court Judge decided the case based on the pleadings as she is bound to do. She first arrived at the conclusion that the plaintiffs failed to establish *locus standi* or legal standing to bring a s. 7 claim which was sufficient to dispose of the claim. She then, for completeness, addressed the causes of action which from the particulars pleaded consisted of both negligence and occupier's liability which counsel submitted is a sub-head of negligence.

[14] Counsel submitted that the pleadings were in accordance with the law stated in *Lembaga Kemajuan Tanah Persekutuan v. Mariam Mangu & Ors* [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197; [1984] 1 MLJ 283 where it was held that the cause of action in negligence could co-exist with the other special sub-head of negligence *ie*, occupier's liability. However, the issue in the instant case concerns the manner of pleading negligence and occupier's liability. The causes of action ought to have been pleaded in separate paragraphs. Instead, both causes of action are said to have been pleaded in para. 8 of the statement of claim including particulars without the phrase 'occupier's liability' appearing in the said paragraph. The learned Sessions Court Judge appeared to have addressed both causes of action in the grounds of judgment. I would do the same *albeit* the manner in which the causes of action were pleaded. But first the issue of *locus standi* the plaintiff's must be addressed.

Locus Standi Or Legal Standing To Bring A Dependency Claim

[15] The first issue concerns proof of fulfilling the necessary conditions of s. 7 to bring a dependency claim. It is a statutory claim without which there is no right to bring such claim at common law. The learned Sessions Court Judge found that sub-ss. 7(2) read with 7(8) were not satisfied and therefore the plaintiffs had no *locus standi* to bring the dependency claim in the court below. It was held there that the plaintiffs failed to fulfil the prerequisite of sub-s. 7(2), which states that only an executor, which by definition in s. 2 includes an administrator, is clothed with the *locus standi* to bring an action on behalf of the dependents of a deceased person. Sub-section 7(2) provides as follows:

> Every such action shall be for the benefit of the wife, husband, parent, child and any person with disabilities under the care, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.

[16] The plaintiffs countered by referring to sub-s. 7(8) which they argued allows the dependents of the deceased to bring a dependency claim in their capacity as dependents. This interpretation is not quite correct. Sub-section 7(8) allows a dependent to bring an action in their capacity as dependents if the 'circumstances' provided therein are satisfied. Sub-section 7(8) provides as follows:

A (8) If there is no executor of the person deceased or there being an executor no action as in this section mentioned has, within six calendar months after the death of the person deceased, been brought by the executor, the action may be brought by all or any of the persons, if more than one, for whose benefit the action would have been brought if it had been brought by the executor, and every action so to be brought shall be
B for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it was brought by the executor.

[17] In the instant case, the circumstances provided in the subsection, namely: (i) there is no executor of the deceased's estate; or (ii) there is an executor but no action is brought by the executor within six months after the
C death of the deceased have not been proven. This was the finding of the learned Sessions Court Judge. There is not an iota of evidence produced by the plaintiffs to prove either of the above circumstances exist. It was not the plaintiffs' case that the deceased does not have an executor or there is an executor, the executor did not commence the action. Thus, even if the
D plaintiffs are parents of the deceased, they cannot maintain a dependency action because sub-s. 7(8) is inapplicable for the above reason. I, therefore, have no reason to disturb the finding of the learned Sessions Court Judge. On this ground alone, the appeal ought to be dismissed.

[18] For completeness, I had considered the Federal Court case of *Kerajaan*
E *Malaysia v. Yong Siew Choon* [2005] 4 CLJ 537 cited by the plaintiffs. I found the *dicta* stated therein in support of the defendant and not the plaintiffs. There, it was stated that sub-s. 7(8) empowers the dependents of a deceased person to maintain a dependency claim even in the absence of letters of administration in certain circumstances. The "certain circumstances" are the
F two conditions that, if proved, would confer legal standing in the plaintiffs to bring a claim under s. 7. This, the plaintiffs have failed to do.

Whether The Plaintiffs Were The Parents Of The Deceased?

[19] This is a connected sub-issue to the issue of *locus standi*. In the court
G below, the plaintiffs tried to adduce evidence which if accepted would have proved that the plaintiffs are the parents of the deceased. The onus of proof lies on the plaintiff to establish their legal standing to sue as dependents. In this regard, the plaintiffs must show proof that they are parents of the deceased. Otherwise, the standing to sue as dependents is not established.

H **[20]** At the court below, the plaintiffs tried to admit a notary certificate concerning the relationship of plaintiffs with the deceased ("ID1") and inheritance certificate ("ID9") and ("ID10"), which are documents of a foreign country, as exhibits but were unsuccessful. The plaintiffs had sought to admit ID1, ID9 and ID10 under sub-s. 78(1)(f) of the Evidence Act 1950
I but the learned Sessions Court Judge found that the criteria stipulated therein was not satisfied by the plaintiffs. Sub-section 78(1)(f) of the Evidence Act 1950 reads as follows:

(1) The following public documents may be proved as follows:

(f) public documents of any other class in a foreign country:

by the original or by a copy certified by the lawful keeper thereof, with a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy is duly certified by the officer having the lawful custody of the original and upon proof of the character of the document according to the law of the foreign country.

[21] Thus, under sub-s. 78(1)(f) of the Evidence Act 1950 the party intending to produce a public document of a foreign country must either:

(i) produce the original public document and give proof of the character of the document according to the law of the said foreign country; or

(ii) a copy of the original document that is certified by the lawful keeper of the said document with a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy is duly certified by the officer having the lawful custody of the original and give proof of the character of the document according to the law of the said foreign country.

[22] The plaintiffs had failed to meet the criteria provided for the admission of the said documents. It suffices to reproduce the reasoning of the learned Sessions Court Judge who agreed with and accepted counsel's submission when holding that ID1 cannot be received as an exhibit in evidence:

[18] ... (a) ID1 tidak menunjukkan salinan dokumen ini telah disahkan benar oleh penjaganya yang sah:

(i) Merujuk kepada mukasurat 60, Ikatan B, didapati bahawa sijil tersebut disediakan oleh Zhang Jian Hua;

(ii) Tiada apa-apa keterangan di dokumen tersebut yang menujukkan bahawa ID1 adalah salinan yang telah disahkan benar oleh penjaganya yang sah; dan

(iii) Tiada apa-apa keterangan di dokumen tersebut yang menunjukkan bahawa Zhang Jian Hua adalah penjaga sah ID1.

(b) Tiada sijil di bawah meterai notori awam atau pejabat konsular Malaysia yang mengesahkan bahawa ID1 adalah salinan benar yang disahkan oleh penjaganya yang sah bahawa:

(i) Dari penelitian meterai pejabat konsular Malaysia yang tertera di ID1, didapati bahawa pejabat konsular Malaysia hanya mengakui sah dan benar tandatangan seorang bernama Yang Zejuan tetapi bukan bahawa ID1 telah disahkan oleh Yang Zejuan sebagai penjaga sah ID1:

(ii) Juga, Yang Zejuan bukan penghasil ID1 dan ID1 tidak menunjukkan bahawa Yang Zejuan adalah penjaga sah ID1;

(iii) Selain itu, pejabat konsular tidak mengesahkan bahawa ID1 telah disahkan benar oleh penjaganya yang sah.

[19] Selanjutnya, mahkamah juga bersetuju dengan hujahan defendan bahawa tiada keterangan saksi pakar dipanggil untuk membuktikan sifat dokumen ID1 mengikut undang-undang negara China bagi memenuhi keperluan dalam Elemen 2 (upon proof of the character of the document according to the law of the foreign country).

[23] The same applies to ID9 and ID10 and registration of household of China (ID11A, ID11B and ID11C). The decision in *Nguyen Doan Nhan v. PP & Another Appeal* [2018] 1 LNS 1583 supports the defendant. That case determined the conditions to be fulfilled under sub-s. 78(1)(f) of the Evidence Act 1950 which the plaintiffs in the instant case failed to do. The relevant paragraphs in that judgment states:

[36] Section 74(a)(iii) of the Evidence Act 1950 states that the following documents forming the acts or records of the acts of public officers, legislative, judicial and executive, whether Federal or State or any part of the Commonwealth or of a foreign country are public documents. Under s. 78(1)(f) of the same Act, public documents of any other class in a foreign country may be proved by the original or by a copy certified by the lawful keeper thereof, with a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy is duly certified by the officer having the lawful custody of the original and upon proof of the character of the document according to the law of the foreign country.

[37] It would appear that both the prosecution and defence had failed to comply with the requirements of s. 78(1)(f) of the Evidence Act. In this case the original birth certificate was not produced but a certified copy thereof. It was certified by a Vietnamese public officer but without a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy was duly certified by the officer having the lawful authority of the original. Similarly, the original passport was not produced but a certified copy therefore, and without the certificate of a notary public or a consular officer of Malaysia as such. The date of birth stated in exhibit P35 was based on the date stated in P34 and hearsay. Strictly speaking these documents should not be admissible for non-compliance with s. 78(1)(f) of the Evidence Act.

Whether The Plaintiffs Being Parents Is An Admitted Fact?

[24] Before me, it was submitted that the defendant, by pleading "no knowledge" in respect of the assertion in the statement of claim that the plaintiffs are the parents of the deceased, has admitted to the truth of such assertion. It was argued that if this assertion is not specifically traversed by way of a denial or non-admission as required by O. 18 r. 13 of the Rules of Court 2012 the assertion is deemed admitted. The decision of the Court of

Appeal concerning this rule in *Soo Boon Siong v. Saw Fatt Seong & Ors* [2008] 1 CLJ 365; [2008] 1 MLJ 27 was cited in support where the following passage of Bullen and Leake and Jacob's, *Precedents of Pleadings*, (12th edn 1975) appears:

> This rule enforces a cardinal principle of the system of pleadings that every allegation of fact in a statement of claim must be traversed specifically. Otherwise it is deemed to be admitted. The penalty for not specifically traversing an allegation of fact is that it will be taken to be admitted, whether this was intended or not. The effect of a traverse, if properly pleaded, is that the party who makes the allegation has to prove it; the effect of an allegation which is admitted or treated as admitted is that the party who makes it need not prove it. Thus, if the facts pleaded in the statement of claim are admitted, there is no issue between the parties of the case which is concerned with those matters of fact and, therefore, no evidence is admissible in reference to those facts.

[25] In my judgment, the reliance of O. 18 r. 13 is misplaced. The provision provides, amongst others, the manner to traverse an "allegation of fact" and the effect of such failure. The capacity of the plaintiff to sue as dependents, that is to say, in the instant case as parents of the deceased is not an "allegation of fact" but the legal standing to sue. Such legal standing is required to be established without which the plaintiffs do not have *locus standi* to commence the action.

[26] Now, O. 18 r. 13 provides as follows:

> (1) Subject to para. (4), any **allegation of fact** made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under r. 14 operates as a denial of it.
>
> (2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.
>
> (3) Subject to para. (4), **every allegation of fact made in a statement of claim** or counterclaim which the party on whom it is served does not intend to admit **must be specifically traversed** by him in his defence or defence to a counterclaim, as the case may be; and **a general denial of such allegations or a general statement of non-admission of them is not a sufficient traverse of them**.
>
> (4) Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.
>
> (emphasis added)

[27] The allegation of facts to be traversed are the material facts on which the party pleading relies to establish his claim. In this regard, O. 18 r. 7(1) provides as follows:

> Subject to the provisions of this rule and rules 10, 11 and 12, every pleading shall contain, and contain only, a statement in a summary form of the **material facts on which the party pleading relies for his claim** or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.
>
> (emphasis added)

[28] In the instant case, the allegations of fact are those which would establish the causes of action of 'negligence' or 'occupier's liability' or both. Those are the facts which must specifically be traversed by a defendant. The legal standing to commence an action is not such an allegation of fact, in the instant case the plaintiffs have failed to establish their legal standing to sue as the documents they sought to admit were rightfully rejected by the learned Sessions Court Judge for not satisfying s. 78(1)(f) of the Evidence Act 1950.

Occupier's Liability

[29] The law of occupier's liability is stated by the Federal Court in *Lee Lau & Sons Realty Sdn Bhd v. Tan Yah & Ors* [1983] 1 CLJ 231; [1983] CLJ (Rep) 222; [1983] 2 MLJ 51 following *Indermaur v. Dames* [1866] LR ICP 274 where the duty of an occupier to its invitee was stated as follows:

> And, with respect to such a visitor at least, we consider it is settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care **to prevent damages for unusual danger which he knows or ought to know**; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact ...
>
> (emphasis added)

[30] In the instant case, there is no issue that the defendant is the occupier and that the deceased was an invitee to the premises on which was the swimming pool that the guests of the hotel or invitees had access. The deceased drowned in the pool. The issue in this case was whether there was an unusual danger with regard to the swimming pool which the defendant, as occupier, knows or ought to know. The pleaded case was that the defendant failed to take reasonable precautions given the 'unusual danger' that the depth of the swimming pool was three meters, not manned by an accredited lifeguard and no warning signs were put up as to the depth of the swimming pool.

[31] I agree with counsel that there is no unusual danger with regard the swimming pool. Every swimming pool would be a "usual" danger carrying the risk of drowning. In *Lee Lau & Sons Realty Sdn Bhd* (*supra*), the Federal Court said an occupier's duty is confined to protection against "unusual"

dangers. The following statements of the House of Lords in *London Graving Dock Co Ltd v. Horton* [1951] AC 737 in relation occupier's liability were approved:

> An "unusual" risk is one which is not usually found in carrying out the task which the invitee has in hand .... The occupier has no duty to the invitee unless there is unusual danger which he knew or ought to have known. ... An occupier owes no duty to an invitee in respect of "usual" dangers since the invitee is only entitled to expect that the invitor (occupier) will take care to prevent damage from "unusual" danger.

[32] In *Darby v. National Trust* [2001] All ER (D) 216 (Jan), the Court of Appeal held that the nature of the risk of swimming in the pool was perfectly obvious even to competent swimmers. In such instance, an absence of warning signs regarding the danger of drowning was not an obvious causative breach of duty on behalf of the defendant.

[33] In any event, in the instant case the learned Sessions Court Judge had made finding of fact that sufficient signs and warning were put up to warn invitees. A 'no lifeguard on duty' signboard was put up at the entrance of the swimming pool which also warned that users shall act at his/her own risk. Further, a finding of fact was made that there were depth markers on the side of the swimming pool that were easily sighted together with the addition of safety floats lines dividing the swimming pool according to depth. In such circumstances, the claim of breach of occupier's duty was rightly dismissed on a balance of probabilities.

Negligence

[34] It is trite that the owner of a premises owes a duty of care to the lawful visitors coming onto its premises due to close proximity between them and the test of negligence in such circumstances is a straightforward application of neighbourhood principle enunciated in the case of *Donoghue v. Stevenson* [1932] AC 562. Thus, by providing swimming pool facilities on the premises, the defendant owes a duty of care to persons using the same. The question in this appeal is whether the defendant breached the duty of care to the deceased.

[35] According to the Court of Appeal in *Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit Swee & Ors* [2002] 4 CLJ 776;

> Whether the duty has been discharged in a given case depends upon a number of factors present or absent on the peculiar fact pattern of the particular case. In other words, the degree of care that ought to be exercised depends, among other matters, on the magnitude of risk to which a plaintiff is exposed in particular circumstances.

[36] The learned Sessions Court Judge had made a finding of fact that the defendant had taken reasonable care to avoid the accident and was not liable in negligence. In the alternative, the defence of *volenti non fit injuria* was held applicable in the circumstances.

[37] The learned Sessions Court Judge considered the issue of breach of duty of care which was the failure to provide an accredited lifeguard and an unusual danger which is the depth of the pool being three meters. This failure was alleged to have caused the casualty. The following submissions made by the plaintiffs were addressed:

> [45] Plaintif-Plaintif menegaskan bahawa defendan gagal mengambil langkah berjaga-jaga yang wajar mengikut standard atau langkah berjaga-jaga bagi sebuah hotel bertaraf 5 bintang dengan kolam renang dengan kedalaman 3-meter bagi, mengelakkan kejadian lemas tersebut berlaku dan menyebabkan kematian Si Mati.
>
> [41] Plaintif-plaintif berhujah bahawa kedalaman kolam renang defendan iaitu 3 meter tanpa pengawasan Penyelamat Bertauliah mewujudkan suatu keadaan bahaya yang luar biasa. Plaintif-Plaintif berhujah bahawa Mahkamah boleh mengambil Pengiktirafan Kehakiman tentang kedalaman biasa bagi hotel-hotel atau resort-resort di Malaysia yang rata-ratanya hanya mempunyai kedalaman maksima sedalam 1.5 meter dan bagi hotel-hotel bertaraf 5 bintang, ianya adalah syarat wajib untuk mempunyai Penyelamat Bertauliah mengawasi kolam renang pada setiap masa ("On Standby").

[38] In this regard, the plaintiff relied on *Liu Li v. Stampark Place Sdn Bhd* [2017] 5 LNS 18 a drowning case at a waterpark. In that case, the deceased aged 24 years was rescued by other swimmers while having difficulties in the pool. CPR was given until an ambulance arrived. The deceased nevertheless passed away a week later due to severe hypoxic brain injury due to secondary drowning. The court of first instance found that the lifeguard was not around when the deceased was having difficulties and held that the brain injury caused the death. On the disclaimer notice, the court of first instance held as follows:

> There was nothing in our case to show how long the disclaimer of liability had been placed there or how conspicuous was it to the public members. This was not before the court, and I do not know why the evidence to that effect was not canvassed. That is to say, I could not say with conviction that such disclaimer of liability would exclude total liability outright.

[39] The court of first instant apportioned liability 20:80. High Court reversed the decision. The Court of Appeal reinstated the decision of the court of first instance. In that case, if evidence was forthcoming there could have been a decision that the disclaimer would have excluded total liability.

[40] The duty of care is to take reasonable care. The question whether the duty has been discharged "depends upon a number of factors present or absent on the peculiar fact pattern of the particular case". Is there a duty to provide lifeguards at all swimming pools generally and this particular pool specifically? It is accepted that a swimming pool would pose a risk of drowning whether the dept be 1.5 meters or 3.0 meters. This would depend on the size, length and the place the swimming pool is situated. There are

no regulations governing swimming pools. A pool at a waterpark or Olympic sized pools where public has access for a fee would require a lifeguard present. So, would a swimming pool in a school or university. It depends on who the users of the pool are and how vulnerable the users are. Swimming pools at resorts and hotels can also differ. The size of the swimming pools differs – separate pools are provided for children and senior citizens where lifeguards are provided while separate pools are provided for grown-ups with signs stating that there are no lifeguards. This includes the providing of medical appliances such as defibrillators. At the end of the day, it all depends on the fact pattern of each particular case.

[41] The plaintiffs argued that the *Stampark* (*supra*) case is on all fours with the instant case. I disagree. The fact pattern of the instant case is so obviously different. The photographs of the instant swimming pool show that it is a small pool whereas the *Stampark* swimming pool is a large swimming pool at a waterpark where a large number of the public use the pool at any one time. Failure to provide lifeguards at such a swimming pool would be a factor. There were findings made in that case that warning signs were not clearly visible. Further, in that case the casualty was still alive when taken out of the swimming pool and inadequate attempts of saving the casualty was made. In this case, the deceased was confirmed underwater for about 30 minutes. There was no evidence that the deceased was still alive when taken out of the swimming pool.

[42] Most importantly, there are other factors present in the instant case. The learned Sessions Court Judge had made several findings of fact that sufficient signs and warning had been put up at vantage places as a warning to pool users. The main and most crucial was that there was a signboard stating 'no lifeguard on duty' put up at the entrance of the swimming pool. This signboard warns users, especially an adult in the instant case, of the danger of entering the pool. The warning is followed with the words that the pool is used at their own risk. Second, there were clear warning signs informing users as to the various depths of the pool by depth markers painted at the side of the pool. Third, in addition to the depth markers, safety floats lines dividing the swimming pool according to the various depths were also laid in the swimming pool. I found no reason to disturb these findings of facts. The findings of facts, as the learned Sessions Court Judge had found, show that in this particular case the defendant had discharged its duty of care to the deceased.

[43] There is no standard practice of operating a swimming pool at a hotel was produced. At this juncture, it is appropriate to deal with the admissibility of ID17 (guidelines for City Hotel Rating year 2017 onwards) and ID18 (minimum requirement for Star Rating of Hotel before 2017) which were sprung at the trial which contain alleged guidelines and requirements in relation to a swimming pool of a hotel. The learned Sessions Court Judge did

not admit these documents in evidence. The plaintiffs had sought to admit these two documents under sub-s. 57(3) Evidence Act 1950 which provide as follows:

> If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until the person produces any **such book or document** as it considers necessary to enable it to do so.
>
> (emphasis added)

[44] Subsection 57(3) of the Evidence Act 1950 cannot be read alone and must be read with sub-ss. (1) and (2). The connecting word with sub-s. (2) is the word "such". The matters that "such books or documents" stated in the sub-s. (3) are the books and documents mentioned in sub-s. (2) while the matters in these books and documents must be one of the fifteen matters mentioned in sub-s. (1). The guidelines and requirements in the form of ID17 and ID18 does not fall within the ambit of any one of the stipulated fifteen matters. The learned Sessions Court Judge was correct in not admitting the documents for the following reasons: (i) the maker of these guidelines was not called to give evidence; (ii) the documents do not fall within the ambit of sub-s. 73A(1) of the Evidence Act 1950; (iii) it was confirmed in evidence that ID17 only took effect on 25 May 2017 which was after the incident involving the deceased; and (iv) that ID18 can no longer be accessed on the website from which it was taken.

[45] The learned Sessions Court Judge found SP6 had not inspected the defendant's hotel or at the time of the incident. Thus, he could not be giving factual evidence. SP6 also admitted that he was not an expert witness. His evidence was based on ID17 and ID18 which documents were held not admissible. The learned Sessions Court Judge had therefore correctly assessed the evidence of SP6 and found the same to be opinion evidence and assumptions.

[46] The Sessions Court Judge had also correctly directed herself to determine that the depth of three meters did not amount to unusual danger and the plaintiffs have failed to prove nor provide any case authorities on such alleged unusual danger. Thus, the act of the defendant renovating the depth of the pool to make it much shallower cannot be taken to show that there was any unusual danger.

[47] Thus, there is no justification for me to disturb the findings and the decision of the learned Sessions Court Judge on liability. It suffices to say that this includes the finding of *volenti non fit injuria* as a separate ground for dismissing the claim.

Damages

[48] It is the duty of the court to assess damages on a 100% basis even if the plaintiffs have failed to prove liability on part of the defendant. In a s. 7 claim the dependents are entitled to claim the following: (i) loss of

support; (ii) reasonable expenses and (iii) bereavement, if the deceased was a minor and not married. The following awards are made based on what was claimed under s. 7 and as pleaded in the statement of claim:

(i) Bereavement sub-s. 7(3B) does not allow a claim for bereavement for the parents if their deceased child is not a minor. At the time of the death, the deceased was aged 22 years and therefore not a minor. Therefore, no award was made.

(ii) Travelling expenses for family. A claim of RM11,774 was made for travelling expenses from China to Malaysia and back for six persons. I am of the view that a claim for three persons is reasonable and awarded RM5,887.

(iii) Funeral expenses. This claim is allowed under sub-s. 7(3)(ii). The whole amount of expenses amounting to RM53,496 as claimed in the statement of claim was allowed.

(iv) Medical report. I allowed RM80 as claimed for the cost of the medical report.

(v) The claims for general damages and exemplary damages were not allowed. Section 7 does not allow these claims (*Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals* [2018] 1 CLJ 585; [2018] 3 MLJ 184). The law is trite. Had it not been for the statutory remedy of s. 7, the plaintiffs do not have the right to bring the suit for the death of a person even at common law. Thus, the provisions of s. 7 must strictly be followed (*Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan* [1982] CLJ 151; [1982] CLJ (Rep) 299).

(vi) Loss of support. I awarded loss of support as follows: RM1,500 x 16 years x 12 = RM280,000.

(vii) Interest. I awarded interest for the expenses at the rate of 5% from the date of filing the writ to the date of full and final settlement, including funeral expenses.

Conclusion

[49] The appeal is for the above reasons dismissed with costs.